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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

THE DELAWARE AND HUDSON RAILROAD CORPORATION,

Appellant,

against

UNITED STATES OF AMERICA, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Appellant The Delaware and Hudson Railroad Corporation (D&H) appeals from the judgment of the United States District Court for the Southern District of New York entered on October 4, 1966, denying appellant's motion for an interlocutory injunction enjoining the operation of, and the taking of any steps to make effective, certain Orders of the Interstate Commerce Commission (Commission) authorizing the merger of Pennsylvania Railroad Company (Penn) and New York Central Railroad Company (Central). Appellant submits this jurisdictional statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

On October 7, 1966, D & H filed with Mr. Justice Harlan an application for a stay of consummation of the merger (Stay Application). By Interim Memorandum dated October 11, 1966, Mr. Justice Harlan referred the Stay Applica-

tion and similar applications of other parties to the full Court. In view of this action, we refer herein at certain points to various portions of the Stay Application in order to avoid unnecessary duplication.

Opinions Below

Pursuant to Sections 2284 and 2325, Title 28, United States Code, this proceeding was brought before a District Court of three Judges for the Southern District of New York. Appellant's motion for an interlocutory injunction and motions of other parties for similar relief, were denied in a 2-to-1 decision. Neither the majority nor the dissenting opinions are as yet reported. Copies thereof have been attached as Appendix A to the jurisdictional statement heretofore filed on behalf of Baltimore and Ohio Railroad Company et al. against the United States of America in this proceeding. To avoid unnecessary duplication, reference is hereby made to said appendix for said opinions.*

The Report and Order of the Interstate Commerce Commission approving the aforesaid merger, dated April 6, 1966, is reported at 327 I. C. C. 475. The Report and Order of the Commission on reconsideration, dated September 16, 1966, and a further Order dated September 29, 1966, setting hearings in these proceedings, are not reported but copies thereof are attached as Appendices B and C to the aforesaid jurisdictional statement of the Baltimore and Ohio Railroad Company *et al.*, to which reference is hereby made.**

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* Reference to pages of said opinions herein will be identified by reference to "B&O J. S. A— ".

** References to pages of said Report and Order of Sepember 16, 1966 herein will be identified by reference to "B&O J. S. B— ".

Jurisdiction

The action below was instituted by Erie-Lackawanna Railroad Company (EL) on September 8, 1966 to set aside the aforesaid Order of April 6, 1966, and on the same day D&H sought leave to intervene as a party plaintiff in said action. The intervention of D&H was granted by order of District Judge Levet on September 14, 1966.

(i) The action of D&H is brought under Sections 1336, 2284 and 2321-2325 of Title 28, United States Code, to enjoin, annul or set aside said Order of the Commission of April 6, 1966, as modified by the Commission, and to obtain an interlocutory injunction enjoining the operation of, and the taking of any steps to make effective, the Order of April 6, 1966, as subsequently modified, pending judicial review.

(ii) The interlocutory injunction requested by D&H was denied by order of the District Court entered on October 4, 1966. Notice of appeal was filed in that Court on October 13, 1966.

(iii) Jurisdiction of the appeal is conferred on the Supreme Court by Section 1253, Title 28, United States Code.

(iv) The statutes involved in this case are:

> Interstate Commerce Act, Sections 5(2)(a), (b), (c) and (d) and 5(9), 49 U.S.C. §5(2)(a), (b), (c) and (d) and §5(9);
>
> Judicial Code, 28 U.S.C. §§1253, 1336, 2284, 2321-2325;
>
> Administrative Procedure Act, Sections 5(b), 8(b), 10(a), (c), (d) and (e), 5 U.S.C. §§1004(b), 1007(b), 1009(a), (c), (d) and (e).

The text of these statutes is attached hereto as Appendix A.

Questions Presented

1. Whether the District Court abused its discretion in concluding that the factors against grant of an interlocutory injunction outweigh the factors supporting grant of an interlocutory injunction?

2. Whether the District Court erred in concluding that the Penn-Central merger may lawfully be consummated prior to determination of terms for protection of D&H?

3. Whether the District Court erred in failing to conclude that D&H would suffer irreparable injury if the Penn-Central merger were consummated on the terms and conditions which have been established in the Commission's Orders of April 6 and September 16, 1966?

4. Whether the District Court erred in concluding that significant benefits to the merged system and to the public would flow from immediate consummation of the merger on said terms and conditions and that any such benefits "weigh heavily" against grant of injunctive relief?

5. Whether the District Court erred in concluding that there should be immediate consummation of the merger regardless of its own finding that certain Commission findings in support thereof were unsound and whether such conclusion of the District Court constituted a violation of the applicable rules governing the exercise of judicial review of administrative action?

6. Whether the District Court erred in concluding that D&H would have adequate judicial review if its right of judicial review were confined to determinations by the Commission as to the conditions for protection of D&H made subsequent to consummation of the merger?

Statement

The Penn-Central merger has been described as the largest railroad merger—and perhaps the largest corporate merger—in American history. The proposal to merge Penn and Central is the third of three unification proposals affecting the railroads in the northeastern quadrant of the United States presented to the Commission in the last few years. On December 17, 1962, the Commission approved, and there has become effective, control by Chesapeake & Ohio Railroad Company (C&O) of the Baltimore & Ohio Railroad Company (B&O), and the latter's interests in its several so-called family lines, the Western Maryland Railway Company, the Reading Company (Reading) and Central Railroad Company of New Jersey (CNJ).* On June 24, 1964, the Commission also approved, and there has become effective, the expansion of the Norfolk & Western Railway Company (N&W) by merger into that company of the New York, Chicago & St. Louis Railroad Company, the lease by the N&W of the Wabash Railroad properties and the acquisition of several other smaller railroad properties.**

In approving the Penn-Central merger, the Commission has also authorized the inclusion in that system of the New York, New Haven & Hartford Railroad Company (NH) as consistent with the public interest. The Commission has directed that such inclusion be accomplished on equitable terms yet to be determined.

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* *Chesapeake & O. Ry. Co.—Control—Baltimore & O. R. Co.*, 317 I.C.C. 261 (1962), aff'd sub nom. *Brotherhood of Maintenance of Way Employees* v. *United States*, 375 U. S. 216 (1963).

** *Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co.—Merger*, 324 I.C.C. 1 (1964).

There remain three principal independent railroads in the Northeast vitally concerned by these unification proposals but not yet affiliated with any of the three systems. These roads are the D&H, EL and the Boston & Maine Corporation (B&M). Reference is hereby made to section 4 of the Stay Application, pages 4-12, for background facts concerning the Penn-Central merger, its effect on D&H, and the railroad merger movement in the East.

The Commission made the following findings in its April 6 Report as to D&H, EL and B&M:

> 1. "The service the three petitioners render their shippers is essential and the public interest dictates that it be preserved." (327 I.C.C. 475, 529)
>
> 2. "Unless somehow protected, through inclusion herein or by some other equitable means, the petitioners would be adversely affected by the proposed merger to a serious degree and would be severely handicapped in providing required transportation to the highly industrialized areas they serve." (*Id.* at 529)
>
> 3. "It is doubtful that, without inclusion in a major system, these three carriers could withstand the competition of the applicants merged, and, *unless* they are *protected* during the period necessary to determine their future, *we would not authorize consummation at this time,* even though approving the merger." (*Id.* at 532) [Emphasis added]

Instead of delaying consummation of the Penn-Central merger until inclusion of D&H, EL and B&M in a major system or systems, the Commission determined to impose certain conditions designed to protect the three railroads "during the period necessary to determine their future." The Commission concluded:

"Our approval of the merger for undelayed consummation shall be subject, therefore, to the conditions specifically described in Appendix G." (*Id.* at 532)

These Appendix G conditions were of two kinds: (1) traffic conditions designed to prevent diversion of D&H, EL and B&M traffic to a Penn-Central system and (2) provisions designed to require Penn-Central to indemnify the three railroads against loss of revenue to the extent and under the circumstances specified in the Report.

The conditions of Appendix G were attacked as insufficient by D&H, as well as by EL and B&M, on petitions for reconsideration addressed to the Commission. The basic position of the D&H was and is that instead of permitting consummation of the Penn-Central merger now, the consummation thereof should be delayed until D&H is actually included in one of the major systems. Alternatively, D&H requested that the conditions be revised in the form proposed by D&H in its petition for reconsideration.

Issues as to the Appendix G conditions raised by D&H included primarily the fundamental inadequacy of the period of protection provided by the Appendix G conditions; the inadequacy and inequity of certain of the provisions as to indemnity; and the obvious necessity for a large number of modifications of the traffic conditions, designed principally to clarify the conditions to accord with what the D&H believed was the intent of the Commission. D&H further questioned the practicability of the

traffic conditions, even as proposed to be revised, in view of the extensive "policing" they would entail.*

Another significant issue raised by the D&H in its petition for reconsideration, which it had also previously pressed, concerned the necessity of imposing upon the proposed Penn-Central system a requirement that, if D&H is to be included in the N&W system, Penn-Central should be required to compensate D&H for loss, if any, on account of the adverse effect of Penn-Central on D&H traffic and revenues, of its going concern or "capital" value which might be reflected in the terms ultimately fixed by the Commission for inclusion of D&H in N&W.** Such protection is to be distinguished from the indemnity for year-to-year operating losses provided in Appendix G to the April 6 Report.

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* In this connection we wish to correct one false impression which may be created in the Stay Application. At page 15 thereof reference is made to the opinion of the Court below as stating that the criticisms of the initial traffic conditions made by the three protected roads "scarcely claimed" that they would be ineffective "but rather proposed ways to make them more effective which the Commission now intends to explore." D&H then states in the Stay Application that "This is of course true as to the conditions when proposed in the April 6 Report accompanied by an indemnity provision."

What we meant by "This is of course true" is that we proposed ways to make the initial traffic conditions more effective. We did not mean to admit that D&H "scarcely claimed" that the traffic conditions as initially drafted by the Commission would be ineffective. On the contrary, D&H claimed otherwise, and the Commission itself noted specifically in its September 16 Report, B&O J. S. B—37, that D&H expressed "doubts as to their practicability".

** The reasoning behind this request is as follows: Normally, a railroad seriously threatened by a merger, and thus a candidate for inclusion in a larger system, would be included in that merger which would adversely affect it. Here, however, in order to preserve rail competition, D&H more logically belongs in another system, N&W. If terms for inclusion in N&W fixed by the Commission reflect a reduction in D&H's present value because of the adverse effects on D&H traffic of a Penn-Central merger, equity compels the conclusion that D&H should not be required to stand such loss in value.

Other parties, including N&W, B&O, C&O, CNJ, Reading and Chicago & Eastern Illinois Railroad Company (C&EI), filed petitions for reconsideration addressed to the Commission opposing the Appendix G conditions, principally the indemnity provision, on the ground that such conditions would affect their traffic and revenues adversely to a serious degree. These other railroads further charged that such indemnity provision would be both unlawful and contrary to the public interest. Because these petitions for reconsideration raised questions as to the enforceability of the Appendix G conditions in the absence of hearing thereon affording such railroads the opportunity to offer evidence concerning the same, D&H also requested in its petition for reconsideration that further hearing on such conditions be held in order that the enforceability of those conditions be assured.

The petitions for reconsideration were not acted on prior to the initiation of the action to review the April 6 Report in the Court below. Thereafter, the Commission, by Report and Order dated September 16, 1966, on reconsideration, rescinded the indemnity provisions of Appendix G and set for a further hearing (subsequently fixed at October 31, 1966 by the aforesaid Order of the Commission dated September 29, 1966) the following questions:

> "(1) in what respects the conditions already imposed in appendix G should be modified; (2) what, if any, modification is needed to prevent manipulations of the type referred to by C&EI or other petitioners; and (3) whether or not the capital loss indemnification provision should be imposed." (B&O J.S. B-42)

The Commission stated in said Report that it is its intent that

> ". . . all the provisions of appendix G will be subject to the further hearing and further considera-

> tion, and such modification thereof as may be found appropriate will be made effective as of the date prescribed in a modification order, except that any provision which may be decided upon for the payment of indemnities will be made applicable retroactively to the date the merger is consummated; and acceptance of these terms and their full observance shall be a further condition to consummation of the merger." (B&O J.S. B-44)

Because of the failure of the Commission to determine, prior to the consummation of the merger, the conditions which it, itself, found essential to protect D&H, as well as EL and B&M, in order to permit "undelayed consummation", D&H intervened in the action brought below and requested that an interlocutory injunction be issued. By order dated October 4, 1966, the District Court, Judge Weinfeld dissenting, denied the motions of D&H and all other parties for such relief. D&H has thus appealed said denial.

Substantiality of Questions Presented

The questions presented by this appeal are substantial and require plenary consideration for their resolution because it is apparent that the Commission's Orders here in question are invalid, and because D&H will suffer irreparable injury if the merger is consummated on the terms and conditions contained in said Orders.

Conditions to the Commission's approval of the Penn-Central merger for the protection of D&H, EL and B&M were found necessary by the Commission itself in its April 6 Report to preserve service essential in the public interest. The Commission further found that such protection was necessary for these carriers during the period required to determine their future in the Eastern rail merger move-

ment if undelayed consummation of the merger were to be permitted.

Initially, in its April 6 Report, the Commission purported to establish conditions which would assure such protection during that period. By its September 16 Report, however, it has rescinded certain of these conditions, subject to possible reinstatement after hearing, and opened up the rest for modification after hearing. Such hearing and final order by the Commission on the Appendix G protective conditions would follow consummation of the merger. It is the contention of D&H that, pending determination as to what these conditions will in fact be, the merger may not be lawfully consummated because the Commission cannot, by reason of such findings in its April 6 Report, lawfully conclude that merger now is consistent with the public interest.

It likewise follows that the failure to develop adequate protective conditions prior to consummation of the merger means that D&H will suffer irreparable injury if the merger is now consummated and that D&H's right to effective judicial review of the Commission's subsequent findings on the Appendix G provisions may be; for all practical purposes, illusory.

I. The Court erred in concluding that the merger may be consummated prior to determination of the protection for D&H, EL and B&M

The Court found (B&O J.S. A-24) that the Commission has made the necessary "vital" findings as to the effect of the Penn-Central merger on other railroads. Its conclusion, however, that the Commission may then leave for determination after merger questions as to the extent of the

protection to be provided in order to satisfy the "vital" findings is error.*

The Court below fails to recognize the distinction between conditions precedent to a transaction and conditions subsequent to a transaction. The mere fact, relied on by the Court below (B&O J.S. A-34) that the parties to the transaction agree in advance to whatever protective conditions may ultimately be established restricting traffic and providing revenue indemnity, which are here deemed by the Commission as essential conditions precedent, cannot alter the fact that it is necessary that those conditions be established prior to consummation of the merger before the lawfulness of the merger itself can be determined.

Put another way, it is only the conditions themselves which can *make* this merger consistent with the public interest, and thus the conditions under which the merger is to proceed are just as "vital" as the findings on which the conditions are based.

The majority below merely speculate that some effective conditions will be established subsequent to merger (e.g., B&O J.S. A-31-32). But one cannot ignore the fact that until those conditions are established, there remains necessarily a possibility that they will not be established.** Nor can one ignore the further possibility that such protective conditions as may be established may be inadequate. Inadequate conditions would not become adequate by provision for retroactive but inadequate indemnity. Unless

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* The unfounded reliance of the Court below on certain previous decisions of the Supreme Court concerning the Commission's continuing jurisdiction under Section 5(9) of the Interstate Commerce Act, 49 U. S. C. § 5(9), is discussed in the Stay Application, pages 16-17.

** The Court's apparent belief (B&O J.S. A-24, 29) that the further hearing can result only in strengthening of the Appendix G traffic conditions is an unwarranted prejudgment. See Stay Application, pages 14-15.

and until these possibilities are removed and the conditions determined, it is not possible to conclude that the consummation of the merger would meet the statutory requirement of Section 5(2) of the Interstate Commerce Act that it be "consistent with the public interest."

The error in the Court's deliberate refusal (B&O J.S. A-36) to acknowledge the possibility that no effective indemnity conditions may be found* is compounded by its faulty conclusion (B&O J.S. A-22) that the special traffic conditions of Appendix G by themselves were "designed to preserve the pre-merger status quo." The Commission in its April 6 and September 16 Reports has uniformly treated *both* the traffic conditions and the indemnity provision of Appendix G as intended to preserve the *status quo*. Thus both the traffic conditions and the indemnity provision were stated by the Commission in its April 6 Report to be "designed to temporarily maintain, as nearly as possible, the status quo as to traffic for which these three petitioners compete with the applicants and other carriers comprising the merged system." (327 I. C. C. 475, 532) Throughout that Report, both the traffic and indemnity provisions were viewed as "the conditions". This treatment is emphasized by the Commission's September 16 Report (B&O J.S. B-14) where the Commission again described *both* the traffic conditions and the indemnity provision as "unique conditions designed to maintain the traffic status quo for these three railroads".

By rescinding the provisions for indemnity by a merged Penn-Central system against loss of traffic suffered by

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* Recognition of the fact that no one can know prior to hearing what will be the Commission's ultimate determination cannot properly be considered, as the Court below would indicate, "an unwarranted reflection on either the Commission's good faith or its competence." (B&O J.S. A-37)

D&H, EL and B&M, subject only to possible reinstatement after further hearing, the Commission shifted the entire burden of providing the necessary protection onto the traffic conditions contained in Appendix G. However, when the Commission had determined upon those traffic conditions in its April 6 Report, it also provided additional protection through the indemnity provisions. Whether or not it might be possible to develop some traffic conditions which would be sufficient alone to avoid injury to the other roads (and we do not believe that it is possible), it is obvious that the existing Appendix G traffic conditions were not so designed or considered by the Commission. The existing traffic conditions without the further indemnity provision, therefore, would appear by the Commission's own findings to be inadequate.

The substitution by the District Court of the conclusion (which had been contended for by appellee's counsel in the District Court*) that the traffic conditions alone had been designed to preserve the *status quo* was a "post hoc rationalization" of the type specifically condemned by this Court in *Burlington Truck Lines* v. *United States*, 371 U. S. 156, 169 (1962). There it was stated:

> "For the courts to substitute their or counsel's discretion for that of the Commission is incompatible with the orderly functioning of the process of judicial review."

See also *SEC* v. *Chenery Corp.*, 332 U. S. 194, 196 (1947), stating the "fundamental rule" of administrative law to be:

> "... that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked

* See, for example, Transcript of oral argument below, page 124.

> by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis."

In its assessment of the significance of the traffic conditions of Appendix G, the Court below was struck by the fact that they are "unprecedented" and go "far beyond anything in history" (B&O J.S. A-10-11, 28), as if this were a reason in itself for finding them to constitute sufficient protection. But the Penn-Central merger also is "unprecedented" and would "go far beyond anything in history" in the extent of its adverse effects on other carriers in the East. A very real question presented by this merger is whether any traffic conditions would be sufficient to protect such a carrier as D&H; certainly the Court below erred, for reasons which we discuss in II hereof, in indicating (B&O J.S. A-28) that the Appendix G traffic conditions alone would suffice.

The Court's statement in this regard (B&O J.S. A-28) that the Commission's finding that there should be indemnity conditions designed " 'to prevent any loss of revenue . . . as a direct result of immediate consummation of the merger' ", while "doubtless within its powers . . . [is] beyond the [Interstate Commerce] Act's demands", is also erroneous. What the law demands is what the public interest requires; and if the Commission properly concludes, as the Court here has found that it may, that it is in the public interest that no loss of revenue should be suffered, then that *is* what the Act demands. To the extent the Court's statement may be construed as an effort to "lead" the Commission in its findings on further hearing as to what is necessary in the public interest, such statement is clearly improper.

II. The Court erred in its failure to find that D&H would suffer irreparable damage by reason of the merger under the terms and conditions provided in the April 6 and September 16 Orders of the Commission

The statement of the Court below (B&O J.S. A-30) that "It was undisputed that, even without the special traffic conditions, some time must pass before the merger would have serious adverse effects on anyone" conveys an erroneous impression as to the D&H. The Court below there said, "Even with respect to D&H", which it recognized as perhaps the most vulnerable of the three protected lines, "Mr. White testified [as chief executive officer of D&H in 1963] he 'would expect it would take a little while for the adverse effect to flow.' " (B&O J.S. A-30)

The D&H evidence before the Court showed that if it were to continue as an independent carrier it would lose revenues of over $4,000,000 a year or 10% of its *gross* revenues, and that over $1,000,000 of this loss would be experienced by the end of the first year following the merger and the full effect after five years. The fact that the *full* adverse effect of the merger would not flow for four or five years, which is obviously what Mr. White was testifying about,* does not militate against the conclusion that a very substantial loss would be experienced by D&H by the end of a year.

The Court below, aware of this testimony, quickly switched its ground, so far as D&H is concerned, from the effect of the merger absent special traffic conditions to the effect of the merger subject to the Appendix G traffic conditions (B&O J.S. A-30). It must of course be recognized that there is no specific testimony in this proceeding as to

* Mr. White's testimony in full on this point may be found in the Affidavit in Opposition below of James B. Gray, dated September 12, 1966, page 8.

the precise loss which D&H would suffer with those conditions in effect, since they were not proposed until after the close of hearings.

However, in view of the D&H situation it was unreasonable for the Court to conclude that such loss even with the traffic conditions of Appendix G would not be substantial. For example, it is clear, as the D&H traffic study showed and the Commission's Hearing Examiners found substantiated,* that D&H stands to lose immediately after merger, *and without service improvements,* traffic which it now interchanges with Penn or other carriers in its present system which, after merger, can be handled from origin to destination by the Penn-Central system (as well, of course, as additional traffic on account of service improvements).

In this connection it is to be noted that the Commission itself, in referring to the "numerous service advantages" which shippers may expect as a result of the merger, referred *first* to "single line service between more points, with less route-circuity, less handling of freight, less switching of cars, and consequently less likelihood of damage, less time in transit and terminal, and easier tracing of shipments" (327 I.C.C. 475, 491). Single-line handling in itself is thus deemed highly desirable by shippers who it must be expected in many cases will specifically prescribe a routing of their traffic to take advantage of such handling, regardless of whether any changes in rates, routes or service proscribed by Appendix G are made.**

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* See Affidavit below of Harry G. Silleck, Jr. dated September 8, 1966, pages 5-7.

** Under Section 15(8) of the Interstate Commerce Act, 49 U. S. C. §15(8), shippers have the right to designate the routing of traffic "subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe." No one has contended in this proceeding that the Appendix G conditions constitute any exception to this provision.

A second illustration of the ineffectiveness of the traffic conditions in prohibiting loss of traffic of D&H concerns the matter of solicitation of business. Because shippers in the great majority of cases exercise their right of specifying the routing of traffic, the life blood of a railroad is its solicitation of favorable routings over its lines, and a cardinal principle of solicitation is "for the long haul". Before the Court below, as noted in the Stay Application, pages 15-16, Penn and Central have urged an exceptionally broad interpretation of the Appendix G traffic conditions, going so far as to claim that they prohibit even solicitation by the merged system of business for its own long haul. But such a construction, even if correct, could not as a practical matter be enforced in any event in view of the hundreds of Penn and Central personnel engaged in solicitation of the multitudinous shippers of freight in this country and the many forms of activity which solicitation may take.

Also, there is by no means assurance that the traffic conditions of Appendix G will not have to endure for a number of years. The Commission in its September 16 Report admits this possibility (B&O J.S. B-15). The longer they last, obviously the more the aggregate loss of traffic and revenue which D&H may experience by reason of their inadequacy.

By the same token, the protection of the Appendix G provisions, inadequate though it is, may not even endure long enough.

In its opinion the majority state (B&O J.S. A-24-25) that the "vital findings from which we would not allow the Commission to depart, at least without complete explanation", upon subsequent judicial review following the proposed hearing, include the finding that those three roads would be seriously hurt "pending inclusion" in a larger system unless protected by something more than the stand-

ard traffic conditions and that some special conditions must be devised to obviate such harm. What the Commission has done, however, is not to provide protection "pending inclusion". What it has provided is protection (to the limited extent of the present Appendix G traffic conditions) "pending final determination" of the petitions for inclusion in the present N&W system or the Penn-Central system or such other period of time as the Commission may prescribe. (327 I.C.C. 475, 561)

Whether or not the words "pending final determination" of an inclusion petition might ordinarily be considered as the fair equivalent of "pending inclusion", that is certainly not the case here where inclusion is strenuously contested. (See Stay Application, pp. 11-12) At the very least, on any construction of the findings made by the Commission as to the need for protection, it is essential that the protection endure until there has been a final determination approving D&H inclusion in one of the Eastern systems. This also is not provided by Appendix G. See Stay Application, pages 18-20 for a complete discussion of the errors of the Court below in failing to grant the injunctive relief requested because this minimum period of protection is not provided in Appendix G.

III. The Court erred in finding that the interests of Penn and Central and the public "weigh heavily" against grant of an interlocutory injunction

In its conclusions as to the factors "weighing heavily" against an interloctory injunction, the Court below (B&O J.S. A-20-22) specifically notes—correctly—that the Commission was in error in resting (B&O J.S. B-15-16) on the proposition that immediate merger is essential to the preservation of NH. Nor does the Court indicate reliance on the Commission's reasoning (B&O J.S. B-15) that because

mergers are subject to changing conditions, the merger might never be effectuated unless it is effectuated at once—a point made by the Commission in its September 16 Report in connection with its concern as to NH. The Court also does not deal with the findings of the Commission (327 I.C.C. 475, 519) that Penn and Central need to be merged because of their financial condition and in order to keep pace with their common carrier obligations in competition with the recently formed C&O-B&O and N&W systems.*

Rather, the Court (B&O J.S. A-19) rests entirely on the operating savings which can be accomplished as a result of the merger and the benefits in improved service to shippers. But the only Commission findings quoted as to the advantages in these respects are those made in the April 6 Report, 327 I.C.C. 475, 491 in support of the merger as a general proposition. There is no reference to any finding, because there is no real finding by the Commission, as to what advantages would be derived by either the applicants or the public by the immediate consummation of the merger *subject to Appendix G.* Rather, the Court below (B&O J.S. A-28 n. 10) quotes the Commission as having found that one result of those conditions " 'would be to deny to applicants and some shippers, for the time being, some of the merger benefits.' " Moreover, the Court fails to add that the Commission went on to say (327 I.C.C. 475, 532):

> ". . . but they [the conditions] *will in no case detract* from the present amount and quality of service being provided by applicants, nor should they work an undue hardship upon applicants either in their operations or merger implementation." [Emphasis added]

* In view of their greatly improved financial condition remarked on by the Court below (B&O J.S. A-19), Penn and Central obviously do not *require* merger *now.*

The implication would seem to be clear that the Commission believes that until the Appendix G conditions are removed, benefits may not in fact be derived in any substantial degree by the merged company or by the public.

The Court below (B&O J.S. A-28 n. 10) simply passes this off as a consequence "during the early years" following merger. But the Commission has stated in its September 16 Report (B&O J.S. B-15) that the inclusion of D&H, EL and B&M in one of the major systems in the East may take "several years". It may in fact take many years, for all the Commission or the Court now knows.

The extent of harm from denial of immediate consummation of the merger in delaying significant merger benefits may actually be no greater than the delay that would be encountered in the merged system's operations under the restrictions of the Appendix G traffic conditions, particularly if they are ultimately construed as broadly as Penn and Central contend in their efforts in court to secure a denial of injunctive relief.

It is by no means clear that the Commission itself would rest its approval of undelayed consummation of the merger merely on the ground of savings in operating costs and benefits to shippers from the merger, particularly where, as here, the Commission has expressed its own considerable doubt as to when such savings and benefits would flow in view of the Appendix G traffic conditions which it imposed. Certainly it would seem that the Commission, unlike the Court, did not consider such factors alone to "weigh heavily" on the side of immediate merger. The Court's reliance on one factor out of a number of factors relied on by the Commission and its distinct non-reliance on the factor which the Commission apparently considered paramount—providing a home for the NH—is additional evidence of the Court's failure to meet the standards established in the *Burlington* and *Chenery* cases cited above.

IV. The Court erred in holding that D&H would have adequate judicial review if its review were confined to review of Commission determinations made subsequent to merger

The Court's conclusion is that D&H and other affected carriers will have the right of judicial review of any Commission determination made after subsequent hearings as to the conditions then to be imposed and that this right is sufficient to protect their interests. Until those conditions are in fact determined, however, we fail to see how the possibility of judicial review of subsequent determinations can be considered adequate. Certainly if it is determined that no adequate conditions can be imposed short of actual inclusion of D&H in one of the systems, and such inclusion has not then been effected, the "right" of judicial review at that time will be meaningless because the merger will have already taken place, and it seems generally conceded that unscrambling this merger is not to be regarded as a realistic remedy. (B&O J.S. A-35, 60) Furthermore, if conditions are imposed which D&H would be able successfully to challenge in the courts as inadequate, the time involved in securing appropriate revision thereof through the processes of judicial review, remand and further Commission consideration might well be such that diversion of substantial amounts of D&H traffic would occur before the relief were obtained. (see Judge Weinfeld, dissenting, B&O J.S. A-59-60)

V. The Court erred in balancing the equities between D&H and Penn-Central

The Court below (B&O J.S. A-16-17) accepted as a correct formulation of the standards governing the exercise of its discretion in granting injunctive relief the factors set forth in *Virginia Petroleum Jobbers Ass'n* v. *FPC*, 259 F. 2d 921 (D. C. Cir. 1958).

D&H has shown that the Orders of the Commission approving the Penn-Central merger without determining the terms for proctection of D&H which the Commission has itself found to be essential to "undelayed consummation" of the merger do not conform to the standards of Section 5(2) of the Interstate Commerce Act; and that D&H would be subject to irreparable injury if the merger were consummated on the terms and conditions presently established in said Orders. The possibilities of harm to other parties and to the public from grant of injunctive relief, on the other hand, do not appear substantial when the situation is compared with that which would exist if the merger were consummated on the terms and conditions presently provided.

Thus, on the basis of the factors enumerated in *Virginia Petroleum Jobbers*, the interlocutory injunction should be granted. Certainly, where, as here, the transaction may not be reversed as a practical matter, the factors supporting injunctive relief weigh most heavily. *Breswick & Co.* v. *United States*, 134 F. Supp. 132, 141 (S. D. N. Y. 1955), rev'd on other grounds, *Alleghany Corp.* v. *Breswick & Co.*, 353 U. S. 151 (1957), discussed in *Stott* v. *United States*, 154 F. Supp. 389, 393 (S. D. N. Y. 1957); *Florida East Coast Ry. Co.* v. *United States*, 228 F. Supp. 340 (M. D. Fla. 1964).

The Court below makes much of what it concludes to be general acceptance by the affected railroads of the

desirability of the Penn-Central merger. Thus it characterizes the actions seeking review of the Commission's Orders authorizing the Penn-Central merger as "mostly" "jockeying . . . for price and position in respect of other mergers". (B&O J. S. A-39)

The Court's approach reflects a failure fully to appreciate the position of the railroad industry in the Northeast on the matter of unification and the nature of the job required under Section 5(2) of the Interstate Commerce Act of railroads affected by unification proposals. It is true that the railroads have been in agreement on the essential need for their restructuring into a limited number of systems in order to meet intermodal competition and keep up with the demands of the growing economy. But it is also true that the three unifications which have been approved by the Commission have had the blessing of the non-included roads only on the premise that they would be properly included in those systems. No one has ever taken the position that the gigantic Penn-Central combine can be divorced from the general merger movement and looked upon individually as a merger consistent with the public interest. The Penn-Central can only be seen in proper perspective when it is realized that a Penn-Central merger is but a part of an overall merger movement and is that part which, unless and until the restructuring is completed, has far and away the greatest capability of injury to, if not destruction of, other railroads, including specifically D&H.

The governing statute does not permit the Commission to initiate railroad combinations. Rather, they must be voluntarily submitted by managements. On the other hand, once they are so submitted, the Commission is required by the statute to consider the effects on other railroads, and it is empowered where the public interest requires, to condi-

tion approval upon inclusion of such railroads and to fix the terms for such inclusion. The participation of other railroads in the proceedings thus protects not merely their own interests but the interests of those segments of the general public associated with them.

The restructuring of the entire railroad map in the Northeast has been presented in three proceedings. The Commission determined to consider these three interrelated unification proposals on a piecemeal basis. One result of this determination, since the Commission has never yet in the four and a half years of proceedings on the Penn-Central application indicated expressly in which system it believes D&H (or EL and B&M) should be from the standpoint of the public interest, has been to necessitate participation by D&H and the other roads in the various separate merger proceedings in order to protect their own interests as well as to serve the general public interest.

The determinations of "position", and of "price" to effect necessary inclusion of the affected carriers in other mergers, are thus in reality matters of prime concern to the public with which the Commission, and the courts within the scope of their judicial review, must come to grips. Certainly, unless the appropriate "position" of the smaller independent railroads in one or another of the major systems is finally established, the merger movement may well turn out to have done more harm than good. If by "jockeying" the Court below means to imply that D&H has been maneuvering to obtain the most favorable terms from one or another of the systems, the accusation is without any basis in fact. Moreover, the matter of "price" is, of course, subject to the Commission's jurisdiction, and any attempted overreaching or disregard of the public interest would be subject to Commission approval both of the terms for inclusion in any system and its determina-

tion that inclusion in the particular system which is sought is consistent with the public interest.

The need for adequate protection of the public interest in the preservation of rail service and, if possible, competitive rail service, compels the conclusion that in this instance the conditions to the merger to achieve such goals are as significant as the merger itself. Until those conditions are finally determined, the merger should be enjoined.

Conclusion

For the reasons stated herein, probable jurisdiction of this appeal should be noted.

Respectfully submitted,

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APPENDIX A.

Pertinent Provisions of Section 5 of the Interstate Commerce Act (49 U. S. C. § 5)

§ 5(2)(a), (b), (c) and (d)

(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard.

Appendix A.

If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms,

the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

§ 5(9)

(9) The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7), as it may deem necessary or appropriate.

Pertinent Provisions of Judicial Code Relating to Judicial Review of Commission Order

§ 1253. Direct appeals from decisions of three-judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

§ 1336. Interstate Commerce Commission's orders

(a) Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

(b) When a district court or the Court of Claims refers a question or issue to the Interstate Commerce Commission for determination, the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission arising out of such referral.

(c) Any action brought under subsection (b) of this section shall be filed within 90 days from the date that the order of the Interstate Commerce Commission becomes final.

§ 2284. Three-judge district court; composition; procedure

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a

temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State.

§ 2321. Procedure generally; process

The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in

part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States.

§ 2322. United States as party

All actions specified in section 2321 of this title shall be brought by or against the United States.

§ 2323. Duties of Attorney General; intervenors

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein.

§ 2324. Stay of Commission's order

The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action.

§ 2325. Injunction; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

Pertinent Provisions of the Administrative Procedure Act

§ 5(b), 5 U.S.C. § 1004(b)

(b) The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 1006 and 1007 of this title.

§ 8(b), 5 U.S.C. § 1007(b)

In cases in which a hearing is required to be conducted in conformity with section 1006 of this title—

• • • •

(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

§ 10(a), (c), (d) and (e), 5 U.S.C. § 1009(a), (c), (d) and (e)

Except so far as (1) statutes preclude judical review or (2) agency action is by law committed to agency discretion.

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

• • • •

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection

whether or not there has been presented or determined any application for a declaratory order; for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.